



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Retrofitting School Buses and Other Diesel Buses as Supplemental Environmental Projects or as Injunctive Relief

FROM: Walker B. Smith, Director *WBS*
Office of Regulatory Enforcement

TO: Enforcement Division Directors, Regions I-X
Regional Counsels, Regions I-X
Media Division Directors, Regions I-X

Over the past year, EPA has encouraged defendants to consider performing school bus retrofit Supplemental Environmental Projects (SEPs), as part of settlements of enforcement actions for violations of environmental laws.¹ The Agency also has received a Conference Committee earmark in the FY 03 budget for a \$5 million dollar grant program to upgrade diesel school bus emission performance. The grant program is being implemented under Section 103 of the Clean Air Act (CAA). In light of this grant program, the attached information will provide specific guidance to Agency staff on how to include bus retrofits, specifically, school bus retrofits, as SEPs in enforcement settlements. The fact that a particular entity has received a grant under CAA § 103 does not necessarily preclude that entity from benefitting from a SEP, provided Agency personnel follow the attached guidance.

EPA's SEP Policy allows EPA, in mitigating a civil penalty as part of a settlement of an enforcement action, to take into consideration a defendant's commitment to perform an environmentally beneficial project meeting the criteria of the April 1998 SEP Policy; EPA has the discretion to negotiate SEPs that require defendants to retrofit diesel buses, including school buses, to reduce harmful emissions of hydrocarbon, particulates and nitrous oxide. Consistent with the SEP policy, there are legal limits on the extent to which the Agency can include diesel bus retrofit SEPs in settlements.

¹ In some cases, EPA may negotiate a consent decree that would require the defendant to retrofit buses owned or operated by specified school districts or other public or private entities as injunctive relief.

As explained more fully in the attached guidance, EPA cannot enter into SEPs that:

- do not have an adequate nexus to the violation at issue;
- allow EPA to manage and control the funds a defendant expends under a SEP, by selecting the particular entity that will receive SEP funds from a defendant to retrofit buses, or otherwise exert inappropriate influence over the defendant's selection of a particular entity or project;
- augment EPA's appropriations by providing the Agency with additional resources to carry out any grant program, or by providing recipients of EPA grants for bus retrofit demonstration projects with additional resources to perform a specific task with a particular entity identified in its grant agreement. However, SEPs which are related to a grant-funded activity may be appropriate.

A list of recent CAA § 103 grantees may be found at http://www.epa.gov/otaq/schoolbus/grants_2003.htm. Enforcement staff should consult this list prior to entering into any settlement agreement that contains a school bus retrofit.

With respect to settlements that include school bus retrofits as either injunctive relief or SEPs, enforcement staff must consult with ORE, prior to reaching agreement on the SEP. In turn, ORE will coordinate with the Office of General Counsel (OGC), and the Office of Transportation and Air Quality (OTAQ), to ensure that the settlement is consistent with this guidance.

Should you have any questions concerning the guidance, please contact Melissa Raack at 202-564-7039 or Beth Cavalier at 202-564-3271 of my staff. For legal questions concerning the augmentation of appropriations, please contact James Drummond of OGC at 202-564-5456; for CAA retrofit grant questions, please contact David Dickinson of OTAQ at 202-343-9256. The required ORE consultation for settlements that include school bus retrofits should be directed to Ms. Raack or Ms. Cavalier.

Attachment

cc: Regional SEP Coordinators

Regional Enforcement Coordinators

B. Gelber, DOJ

K. Dworkin, DOJ

M. Oge, OTAQ

J. Blubaugh, OTAQ

J. Drummond, OGC

D. Dickinson, OTAQ

GUIDANCE ON INCLUDING SCHOOL BUS RETROFITS IN SETTLEMENTS

I. General Guidance

EPA will implement the \$5 million committee earmark for cost-sharing grants to school districts “for necessary upgrades to their diesel bus fleets” under its authority in CAA § 103. This section allows EPA to provide grants to promote the coordination and acceleration of research and demonstrations into the most effective applications of retrofit technologies on engine applications. The CAA § 103 grant program, managed by the Office of Transportation and Air Quality (OTAQ), will support research, investigations and similar activities designed to demonstrate and encourage replication of various models for successfully implementing projects that reduce pollution from school buses through the use of EPA verified or certified pollution reduction technology. EPA’s goal, under the CAA § 103 grant program, is to fund a range of programs from across the country representing urban, rural, and large and small school districts, as well as a variety of different technologies and fuels.

When Congress has authorized funding for a grant program, Federal appropriations law prevents EPA from augmenting that appropriation by agreeing to SEPs which would essentially provide EPA with additional resources to carry out the activities for which Congress has authorized funds. Thus, in order to avoid running afoul of the prohibition on augmentation of appropriations, SEPs involving school bus retrofits must achieve a different principle purpose than the CAA § 103 grant program described above. These SEPs must not further research into the technology of retrofits, or demonstrate methods to overcome any technical or organizational challenges that such technology may face in installation or implementation. Rather, school bus retrofit SEPs must retrofit school buses using established technologies and application models, thereby ensuring that these projects are not eligible for funding under OTAQ’s CAA § 103 grant program. The technologies and retrofit procedures for school bus retrofit SEPs must have a high degree of certainty in achieving emissions reductions and be limited to retrofitting buses on a routine or ongoing basis, as opposed to demonstrating technologies and application models that can be used by school systems. OTAQ maintains a lists of certified bus retrofit equipment and verified school bus retrofit equipment that may be found at [www.http://www.epa.gov/otaq](http://www.epa.gov/otaq).

Consent decrees that call for retrofitting school buses as injunctive relief should also clearly distinguish such retrofits from the activities funded by the Agency’s CAA § 103 school bus research and demonstration grant program, to avoid any appearance of augmentation. For example, consent decrees that call for routine retrofitting of school buses are acceptable, as long as the defendant retrofits school buses using technologies and application models that have already been proven to be successful. On the other hand, injunctive relief should not be used to require projects that demonstrate new retrofit technologies.

Agency personnel must not imply that SEPs augment EPA appropriations by making inappropriate statements to the public that inaccurately portray SEP funds as part of the grant program efforts or otherwise convey the impression that EPA is managing and controlling the SEP funds.¹

II. Implementation

A. Grants

OAR's research, investigation, and demonstration grant program requires that recipients provide a 5% non-Federal cost share or "match." Matching funds, like Federal assistance funds, must be used only for authorized grant purposes. Costs that are ineligible for Federal assistance under the grant are also ineligible for funding by the match. See 40 C.F.R. § 30.23(a)(4) and 40 C.F.R. § 31.24(a)(1). As stated above, SEP funds cannot be used for the same purposes as OAR's CAA § 103 school bus retrofit research, investigation, and demonstration grant program. Therefore, CAA § 103 grant recipients cannot use as their match, money or in-kind services contributed by defendants as a SEP.

In addition, to investigating and demonstrating the technology and its potential, EPA's grants may support research efforts to compile information and provide training on ways to overcome any structural, organizational, or technical challenges that may arise in implementing a project to reduce pollution from school buses. This may include gathering and disseminating information regarding the effectiveness of verified or certified technology on a range of school bus engine types operating in a variety of conditions.

B. Enforcement Settlements

In any settlement in which a defendant is agreeing to perform a project (either as a SEP or injunctive relief) involving school bus retrofits, or agreeing to perform a project that could include school bus retrofits (e.g., where the decree language is broad and requires the submittal of a more specific plan post-consent decree entry), the applicable language from among the following alternatives should be included:

Alternative 1 (Toyota settlement model): When the SEP or injunctive relief requires the defendant to present a retrofit plan meeting certain criteria to EPA:

"EPA reserves the right to reject all or part of a project plan if EPA concludes that all or part of a specific project is otherwise inconsistent with the Agency's SEP Policy, applicable

¹ Although this guidance focuses primarily on SEPs or injunctive relief involving school bus retrofits, it may also apply to situations in which the Agency issues research, investigation, and demonstration grants under CAA § 103 for other diesel engine retrofits, e.g., retrofits of public buses, trains, trucks, or nonroad equipment.

Agency guidance or any other provision of law.”

Alternative 2: For settlements that require the defendant to retrofit school buses, either as injunctive relief or as a SEP (no plan; description in settlement):

“All retrofits conducted under this agreement, shall use technologies, application models and/or equipment that have been verified or certified by EPA to achieve measurable emissions reductions.”

C. Public Statements/Press Releases

EPA may advise the public of the Agency’s policy of encouraging defendants to consider appropriate school bus retrofits as part of settlements. However, Agency personnel must avoid making statements that create expectations that EPA can direct defendants to retrofit school buses in specific municipalities or school systems through a SEP. Statements regarding SEPs must clearly indicate that the defendant is managing and controlling the SEP funds; not EPA. In addition, Agency officials must not state or imply that funds for school bus retrofits undertaken as injunctive relief or as a SEP, increase, supplement or contribute to the funds Congress has provided for EPA’s own retrofit research, investigation, and demonstration grant program, under CAA § 103.